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No. 04-27

IN THE

Supreme Court of the United States

AMERICAN NATIONAL INSURANCE COMPANY, MONUMENTAL LIFE INSURANCE COMPANY, AND THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY

Petitioners,

v.

MATTIE BRATCHER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
GENE C. SCHAERR
KATHI A. COVER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record
Additional counsel on inside cover

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

JOEL S. FELDMAN
JEFFREY E. CRANE
SIDLEY AUSTIN BROWN
& WOOD LLP
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

ANDREW J. MYTELKA
JANET L. RUSHING
STEVE WINDSOR
GREER, HERZ & ADAMS
One Moody Plaza,
18th Floor
Galveston, TX 77550
(409) 797-3200

STEPHEN H. KUPPERMAN
BARRASSO USDIN
KUPPERMAN FREEMAN &
SARVER, L.L.C.
909 Poydras Street
Suite 1800
New Orleans, LA 70112
(504) 589-9700

ANTHONY ROLLO
MCGLINCHEY STAFFORD
643 Magazine Street
New Orleans, LA 70130
(504) 586-1200

THOMAS A. CASEY, JR.
JONES, WALKER,
WAECHTER, ET AL.
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. THE QUESTION PRESENTED WAS DECIDED BELOW AND THIS COURT SHOULD RESOLVE THE CIRCUITS' CONFLICTING APPROACHES AND RESTORE UNIFORMITY TO RULE 23	3
II. THIS CASE POSES CRITICAL QUESTIONS CONCERNING WHEN, IF EVER, A RULE 23(B)(2) CLASS SEEKING MONETARY DAMAGES CAN LAWFULLY BE CERTIFIED	5
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 6
Allison v. *Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) 3, 4
Andrews v. *AT&T Co.*, 95 F.3d 1014 (11th Cir. 1996) 8
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 7
Great-West Life & Annuity Ins. Co. v. *Knudson*, 534 U.S. 204 (2002) 6
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 8
Molski v. *Gleich*, 318 F.3d 937 (9th Cir. 2003) 5
Ortiz v. *Fibreboard Co.*, 527 U.S. 815 (1999) 1
Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 1
In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 8
Rutstein v. *Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228 (11th Cir. 2000) 8
Ticor Title Ins. Co. v. *Brown*, 511 U.S. 117 (1994) 1
Verizon Communications, Inc. v. *FCC*, 535 U.S. 467 (2002) 2, 4
Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083 (1991) 4
Yee v. *City of Escondido, Cal.*, 503 U.S. 519 (1992) 4

STATUTES

42 U.S.C. § 1988(b) 8
§ 2000e-5(g)(1) 6

TABLE OF AUTHORITIES – continued

OTHER AUTHORITY

Page

State of Md. Ins. Admin. et al., *Multi-State Market Conduct Examination Report of the Life Business of the Monumental Life Insurance Company* (2003), *available at* http://www.mdinsurance.state.md.us/documents/MonumentalMulti-State6-2-03.pdf..... 10

INTRODUCTION AND SUMMARY OF ARGUMENT

The Brief in Opposition ("Opp.") is most remarkable for the points it does not contest. It does not dispute the existence of an explicit conflict among the Circuits on the standard for Federal Rule of Civil Procedure 23(b)(2) class certification. It does not address – let alone dispute – the tension between the decision below and *Ticor Title Insurance Co.* v. *Brown*, 511 U.S. 117 (1994), *Ortiz* v. *Fibreboard Co.*, 527 U.S. 815 (1999), and *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). It *acknowledges* that numerous courts of appeals ignore Rule 23's distinct criteria for certification of (b)(2) classes seeking injunctive relief and (b)(3) classes seeking money damages, and treat Rule 23 as an *a la carte* menu from which a court can order class certification under (b)(2) and mandatory notice under (b)(3), and yet omit (b)(3)'s opt-out rights and predominance and manageability requirements. Finally, plaintiffs admit that between 20 and 82% of the class would *receive no benefit from an injunction*, because the Insurance Companies have not offered dual rates or policies for decades, and numerous policies have lapsed or been adjusted. Opp. 13.[1]

Plaintiffs' tacit agreement with numerous points in the petition demonstrates that the decision below warrants review. Only this Court can resolve the circuits' disparate approaches to Rule 23(b)(2) certification. And, plaintiffs' admission that between 20 and 82% of class members will not benefit from any injunction, in combination with the Fifth Circuit's acknowledgement that individual damages "depend on the idiosyncrasies of the particular dual rate or dual plan policy" (App. 16a), make this case an appropriate vehicle for resolving the conflicting tests for Rule 23(b)(2) certification.

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[1] Plaintiffs falsely state that the sale of dual rate and plan policies did not cease until 1981. Opp. 6. The Fifth Circuit found it "undisputed" that such sales had ended by "the early 1970s." App. 5a.

None of plaintiffs' arguments casts doubt on the preceding propositions. Plaintiffs first contend that the "conflict among the circuits claimed in the petition was never raised in the lower courts." Opp. 10 (capitalization omitted). This Court requires only that the *legal issue* presented (the standard for Rule 23(b)(2) certification), not the conflict in the circuits, be "'pressed or passed upon'" by the lower courts. *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002). In any event, the Court's actual conditions for review *and* plaintiffs' made-up condition are satisfied. After the district court's denial of class certification was reversed, the Insurance Companies petitioned for rehearing *en banc*, arguing that the Fifth Circuit's approach to Rule 23(b)(2) certification violated Rule 23 and their due process rights, and conflicted with that of other circuits. See Pet. Reh'g En Banc at 6-8, 11-14, No. 02-30540 (5th Cir. filed Aug. 27, 2003).

Plaintiffs next argue that this case involves only an erroneous application of *Allison*'s incidental-damages test. In fact, however, the Circuits employing the incidental-damages approach are fundamentally inconsistent about when damages are "incidental." The decisions in *Ticor*, *Ortiz*, and *Shutts* have left the circuits in disarray about both whether Rule 23(b)(2) classes can *ever* be certified when money damages are sought, and whether Rule 23 allows courts to grant notice and opt-out rights to (b)(2) classes to address the Court's due process concerns. In addition, under the Second and Ninth Circuits' *ad hoc* approach, which focuses on plaintiffs' subjective intent in filing suit, the class at issue would *not* have been certified, because the alleged discrimination had ceased and "the true central relief sought . . . in this case is for monetary damages." App. 55a.

Plaintiffs' remaining arguments cite specific features alleged to make this case a poor vehicle for resolution of the Rule 23(b)(2) standard. These arguments all lack merit. See Part II. This case provides the Court with an opportunity to

resolve when, if ever, Rule 23(b)(2) certification is lawful for a class seeking money damages.

ARGUMENT

I. THE QUESTION PRESENTED WAS DECIDED BELOW AND THIS COURT SHOULD RESOLVE THE CIRCUITS' CONFLICTING APPROACHES AND RESTORE UNIFORMITY TO RULE 23.

Plaintiffs effectively concede both the existence of a mature conflict among the circuits regarding the proper standard for certifying a Rule 23(b)(2) class, and the irreconcilable tension between the circuits' standards and the due process concerns stated by this Court in *Ticor*, *Ortiz* and *Shutts*. See Pet. 14-20. But, plaintiffs argue that the petition should be denied because the conflict was not raised below. Opp. 10. Plaintiffs claim that despite prevailing in the district court, the Insurance Companies were required to argue to the Fifth Circuit that (i) they would prevail under the legal test applied by two other circuits, and (ii) the decision the court had not yet made placed it in conflict with other circuits. This argument is based on factual error, is legally wrong, and makes no sense.

In fact, the district court agreed with petitioners that the class could not legally be certified under Rule 23(b)(2). On appeal, the Insurance Companies defended that decision as consistent with the Fifth Circuit's *Allison* test, as they were required to do. See, *e.g.*, *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 411 n.3 (5th Cir. 1998) ("in the absence of a clearer statement by the Supreme Court or en banc reconsideration of the issue, the panel is bound by circuit precedent"). Once the court of appeals reversed the district court's determination, however, petitioners sought rehearing *en banc*, arguing that the decision (a) "destroys any distinction between (b)(2) and (b)(3)" (Pet. for Reh'g En Banc at 7), (b) authorizes certification where most of the class

could not benefit from an injunction and where "'complex individualized [damages] determinations'" are required (*id.* at 7-8), (c) is inconsistent with *Ticor* and with the due process rights of plaintiffs and defendants (*id.* at 11-12), and (d) conflicts with four other circuits' predominance tests and with the alternative approach adopted by the Second and Ninth Circuits (*id.* at 13-14). In sum, petitioners addressed the conflict with other circuits, with this Court's decisions, and with Rule 23 as soon as that conflict occurred.

On certiorari review, this Court requires only that the *legal issue* presented (whether the class can be certified under Rule 23(b)(2)) be "'pressed'" or "'passed upon'" in the lower courts. *Verizon*, 535 U.S. at 530. This rule has special force where, as here, "the issue . . . is in a state of evolving definition and uncertainty" and is of "importance to the administration of federal law." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (internal quotation marks omitted). Cf. *Yee* v. *City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) (if the issue is decided below, the petitioners may "formulate[] any argument they like[] in support of that claim here"). Resolution of intercircuit conflicts is the province of this Court. In any event, the Court's actual conditions for review and plaintiffs' asserted requirement that the conflict be raised below are all fulfilled here.

Plaintiffs' additional, implicit contention is that this case is not worthy of review because it is just a botched application of *Allison*'s standard. Plaintiffs do not even address the effect of *Ticor*, *Ortiz* and *Shutts*. This case embodies the continuing conflict surrounding the standard for Rule 23(b)(2) certification, and the degeneration of Rule 23. Circuits employing *Allison*'s incidental-damages test take conflicting approaches in determining when money damages are "incidental." These courts admittedly need guidance about whether Rule 23(b)(2) classes seeking money damages can be certified by the device of providing (b)(3) notice and opt-out rights to class members. Pet. 18-20. See, *e.g.*, *Allison*, 151

F.3d at 411 n.3 (*Ticor* "casts doubt on the proposition that class actions seeking money damages can be certified under Rule 23(b)(2)"). The class at issue could not legally have been certified if the court had either adopted the approach set forth in *Ticor* or adhered to Rule 23.

Finally, the Insurance Companies plainly would have prevailed under the Second and Ninth Circuit's test which focuses on the plaintiffs' subjective "intent . . . in bringing the suit," *Molski* v. *Gleich*, 318 F.3d 937, 950 (9th Cir. 2003). Because the Companies ceased the contested practices decades ago, there is no dispute that the "true central relief sought by the plaintiffs in this case is for monetary damages" and that the class could have only been certified, if at all, under (b)(3). App. 55a. See also Brief *Amicus Curiae* Chamber of Commerce at 12-14; Pet. Reh'g En Banc at 13-14.

In sum, the circuits employ explicitly and implicitly conflicting Rule 23(b)(2) standards, and those standards also conflict with Rule 23, as analyzed in this Court's decisions. Because the uniform interpretation of Rule 23 is critically important to the administration of justice in this country, this Court's intervention is urgently required.

II. THIS CASE POSES CRITICAL QUESTIONS CONCERNING WHEN, IF EVER, A RULE 23(B)(2) CLASS SEEKING MONETARY DAMAGES CAN LAWFULLY BE CERTIFIED.

Plaintiffs make a series of case-specific arguments that this is not a good vehicle for resolution of the Rule 23(b)(2) standard. We respond in detail to demonstrate that the important issue presented can readily be decided here.

First, plaintiffs claim that Rule 23(b)(2) certification is lawful because they do not seek legal damages, but rather the equitable restitution of past premium overcharges. They fail to mention that both lower courts rejected this assertion. App. 15a-16a; 54a-55a (citing *Great-West Life & Annuity Ins. Co.*

v. *Knudson*, 534 U.S. 204 (2002)). In *Great-West*, this Court expressly held that restitution is equitable where a plaintiff "'assert[s] title or right to possession of particular property,'" but is *legal* where a plaintiff has only a legal "'ground[ ] for recovering money'" such as that held by a general creditor. 534 U.S. 204, 213 (2002). Plaintiffs do not seek equitable damages because they do not seek money or property that can "clearly be traced to particular funds or property in the defendant's possession." *Id.*[2]

In addition, plaintiffs ignore that for purposes of Rule 23(b)(2), the inquiry is not whether the relief is equitable or legal, but whether the relief flows uniformly to the class "as a whole," or must be individually determined. If the determinations are individual, the money damages are not incidental. App. 15a-16a (the question whether monetary remedies are incidental "has more to do with the uniform character of the relief rather than with its label"). Finally, class counsel has carved up its cause of action, eschewing relief (emotional distress and punitive damages) that might be available to individual plaintiffs to increase the likelihood of class certification with its coercive pressure to settle. This tactic certainly benefits class counsel, but in *Ticor*, this Court

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[2] Plaintiffs' reliance on *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), is wholly inapt. Opp. 15. That case concerned backpay under Title VII of the Civil Rights Act of 1964, *see* 422 U.S. at 408-09, a remedy defined by the statute as "equitable." 42 U.S.C. § 2000e-5(g)(1). Indeed, *Great-West* not only rejects the analogy between backpay and equitable restitution, it also questions the equitable nature of backpay generally. *See* 534 U.S. at 218 n.4 ("Congress 'treated [backpay] as equitable' in Title VII only in the narrow sense that it allowed backpay to be awarded *together with* equitable relief") (citation omitted; alteration in original). As the Fifth Circuit explained, "[i]t would be mistaken to presume that because backpay – a remedy readily calculable on a classwide basis – is compatible with a rule 23(b)(2) class, any other remedy designated as equitable may automatically piggyback a claim for injunctive relief." App. 16a.

questioned whether it is appropriate to certify a (b)(2) mandatory class in these circumstances.

Second, plaintiffs assert that the Insurance Companies are bad actors who allegedly engaged in discrimination that had a class-wide impact. Opp. 12-13. Rule 23's requirements are not suspended in cases alleging discrimination. Ignoring both that the policies at issue have not been sold since at least "the early 1970's" and the vast adjustments the Insurance Companies have already made in the regulatory process, App. 5a, 56a-57a, plaintiffs essentially argue that the class should be certified because the Insurance Companies deserve to pay more than they already have paid. This argument is not relevant to whether this Court should hear the case.[3]

Third, plaintiffs assert that at least one million and potentially 4.5 million class members can benefit from injunctive relief. Opp. 13. Even accepting plaintiffs' incorrect characterization,[4] between one million and 4.5 million class members (20-82%) would receive *no* benefit from an injunction. *Id.* Petitioners submit that in such circumstances, as a matter of law, the monetary relief sought is not "incidental" and the class cannot be certified under (b)(2). The class must, at the very least, exclude plaintiffs

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[3] The Insurance Companies' liability is determined by the substantive law that applies; and the Companies have a due process right to have individualized defenses related to the damages amount and limitations addressed. The Companies seek to avoid an unlawful class certification that deprives them of due process and coerces them to "settle and . . . abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). *See also* Brief *Amicus Curiae* of ACLI at 12-16.

[4] This statement confuses "class members" with holders of industrial life policies. The experts disagreed on the *total* number of industrial life policies from the relevant period remaining in force, with the Insurance Companies' expert saying one million and plaintiffs' expert saying 4.5 million – but it is undisputed that this is the total number of industrial life policies, *not* the number allegedly affected by race-based pricing. *See* App. 5a.

seeking only money damages. This case thus starkly presents the critical question whether (b)(2) certification is lawful when a substantial percentage (potentially a majority) of the class receives only monetary relief.

Fourth, plaintiffs claim that class members seek only $300-$500, and thus have "negative value" claims. Opp. 3, 12. The dollar figures are new and unsupported by any citation. The negative-value claim ignores the law and practical realities. Individual plaintiffs here are entitled to seek not only compensatory damages, but also statutory attorneys' fees and punitive damages. See 42 U.S.C. § 1988(b) (attorneys' fees); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (punitive damages). The availability of such relief is critical to whether the claim has negative value. See *e.g.*, *Rutstein* v. *Avis Rent-A-Car, Sys., Inc.*, 211 F.3d 1228, 1241 n. 21 (11th Cir. 2000) (where "individual plaintiffs may be entitled to substantial compensatory and punitive damages should they prevail, the most compelling justification for a Rule 23(b)(3) class action – the possibility of negative value suits – is absent"); *Andrews* v. *AT&T Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995). Equally to the point, more than *2000* individual claims that have been filed in this multi-district litigation, belying any negative-value characterization. Finally, class counsel amputated whole categories of relief (damages for emotional distress and punitive damages) to create a case involving lower-value claims – conduct that should not be rewarded with (b)(2) certification.

Finally, plaintiffs agree that individual damages determinations are required, but insist that the information is available, that the criteria are objectively ascertainable, and that grids can be constructed that will allow the determination of damages. But the district court – the court that would have to handle these hearings – found:

> in order to correctly assess damages the Court would still have to consider: 1) the plaintiff's age at the time

> the policy was issued; 2) whether the policy had built in benefits, such as a loss of limb benefit; 3) whether the premium as calculated was race-neutral; and 4) whether any dividends were paid on any policies. . . . . There would need to be a determination of which policies had been adjusted, the amount of the adjustment and whether the adjustment was sufficient. All of this further illustrates the need to conduct personalized hearings that focus on the idiosyncrasies of each policy and each purchaser. [App. 56a-57a.]

Far from disputing that massive factual inquiries were necessary, the Fifth Circuit conceded that the case required complex damages determinations and depended on individual "idiosyncrasies" and numerous variables. The court believed that if the information existed (though not in evidence) and the numerous relevant variables were somehow objectively ascertainable, then it was legally irrelevant that potentially millions of individual inquiries were required to determine individual damages. App. 17a. To the contrary, the required damages inquiries establish, as a matter of law, that the money damages sought are not incidental to injunctive relief.[5]

Ironically, in arguing that the calculations are possible and manageable, plaintiffs rely on the Insurance Companies' massive adjustments to many industrial life policies. This reliance is utterly misplaced. It is undisputed that plaintiffs

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[5] Other than falsely stating in their Opposition Brief (at 7) that none of the publications regarding race-based rates mentioned defendants by name (*but see* R. Doc. 367, App. D, tabs 31, 33, No. 02-30540 (5th Cir. filed July 2, 2002) (naming ANICO and Western-Southern), *and id.* tabs 31, 33, 37, 41, 42 (mentioning Monumental's acquired companies, Durham Life Insurance Co., Public Savings Life Co., Security Trust Life Insurance Co., and Kentucky Central Life Insurance Co.)), plaintiffs offer no response to the Insurance Companies' demonstration that they have a right to show that individual plaintiffs had actual or constructive knowledge of dual rates before the limitations periods governing these claims had run. Pet. 28-29.

are unsatisfied with the adjustments; thus, the adequacy of particular adjustments would have to be individually assessed. App. 57a. In addition, the only record evidence is that the Insurance Companies themselves were not always able to determine the race of policyholders or the other variables relevant to assessing which policies required adjustment so that the Companies had to make overbroad adjustments.[6] See also State of Md. Ins. Admin. et al., *Examination Report of the Life Business of the Monumental Life Insurance Company* 19 (2003), *available at* http;//www.mdinsurance.state.md.us./documents/monument-al/multi-state06-2-03.pdf ("it cannot be determined on an individual basis whether race was the sole factor, but a likelihood of discrimination on a plan code basis can be determined"); *id.* at 14 (the Company "adjusted the in-force business of various plan codes based on the likelihood that race was a factor, without knowing whether specific individuals were placed in a plan code based on race").

The question whether massive individual damages inquiries are legally consistent with Rule 23(b)(2) certification is directly presented by this case. The Court should grant certiorari and use this case as a vehicle to resolve the questions left open in *Ticor* – the availability and meaning of "incidental" damages under Rule 23(b)(2), and the relationship between (b)(2) and (b)(3) certification.

CONCLUSION

The petition for certiorari should be granted.

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[6] *See, e.g.*, Test. of Actuary Leonard Buckner regarding Providian (now part of Monumental) ("policies that we could either determine definitely had different rates based on race, or they had characteristics where you couldn't be sure but to be on the safe side, we assumed that they had been [based on race],") (R. Doc. 367, App. A. tab 7, at 37, No. 02-30540 (5th Cir. filed July 2, 2002); Test. of Carroll Hutchison (Western-Southern adjusted policies held by Caucasians because of the absence or incompleteness of records), *id.* tab 43 ¶ 11.

Respectfully submitted,

JOEL S. FELDMAN
JEFFREY E. CRANE
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

ANDREW J. MYTELKA
JANET L. RUSHING
STEVE WINDSOR
GREER, HERZ & ADAMS
One Moody Plaza,
18th Floor
Galveston, TX 77550
(409) 797-3200

THOMAS A. CASEY, JR.
JONES, WALKER, WAECHTER, ET AL.
201 St. Charles Avenue
New Orleans, LA 70170
(504) 582-8000

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
GENE C. SCHAERR
KATHI A. COVER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

STEPHEN H. KUPPERMAN
BARRASSO USDIN KUPPERMAN FREEMAN & SARVER, L.L.C.
909 Poydras Street
Suite 1800
New Orleans, LA 70112
(504) 589-9700

ANTHONY ROLLO
MCGLINCHEY STAFFORD
643 Magazine Street
New Orleans, LA 70130
(504) 586-1200

Counsel for Petitioners

August 24, 2004

* Counsel of Record